

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**WESTERN CAB COMPANY**

**and**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION, AFL-CIO/CLC**

**Cases 28-CA-131426  
28-CA-132767  
28-CA-135801**

**CHARGING PARTY'S RESPONSE TO WESTERN CAB COMPANY'S  
BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO DECISION AND  
RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE**

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UNITED STEEL, PAPER AND  
FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION

November 12, 2015

In accordance with Section 102.46 of the Board's Rules and Regulations, Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") submits this Response to Respondent Western Cab Company's Brief in Support of Cross-Exceptions to Decision and Recommended Order of Administrative Law Judge ("Company Brief").

## **I. INTRODUCTION**

Some of the issues presented here are extensively briefed in the Union's Brief in Support of Exceptions to the Decision and Recommended Order of the Administrative Law Judge ("Union Brief") and the Union's Reply to Western Response ("Reply"), particularly those related to unilaterally-implemented discretionary discipline and the proper remedy for those violations. Those arguments are summarized here, with reference to lengthier discussion in the other, already-filed documents.

Here, Western excepts to Administrative Law Judge ("ALJ") Sotolongo's Decision and Recommended Order ("ALJD") for its non-existent reliance on *Alan Ritchey*, 359 NLRB No. 40 (2012), for precedential value. In fact, the ALJ looked to *Alan Ritchey* only for persuasive value because that case was invalidated by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Rather, he reasoned that the Board would re-adopt the *Alan Ritchey* principles. This case does not re-hash *Noel Canning*. This case involves Western's actual violations of Section 8(a)(5) when it failed to bargain with the Union, the certified bargaining agent of its employees, before imposing discretionary discipline on well over 100 employees. Western's exceptions must fail because they entirely neglect the precedent-based portions of the ALJD that find discipline is a mandatory subject of bargaining and the Company made changes without notice to the Union. Western further excepts to the ALJ's determination that it refused to bargain over changes to

healthcare; again, this argument fails because Western provided no notice to the Union of that change to a mandatory subject.

## **II. ARGUMENT**

### **A. The Board Should Overrule *Fresno Bee*.**

Although ALJ Sotolongo referred to *Alan Ritchey* in his Decision, it was for persuasive value—not precedential. The ALJ cited one of his prior decisions, in which he specifically notes that, “[a]lthough *Alan Ritchie* [sic] is not valid precedent in light of its invalidation by *Noel Canning*, I find its reasoning persuasive, and more importantly, I believe it is reasonable to assume that its principles will be re-affirmed by the Board in the near future.” *Kitsap Tenant Support Services*, JD(SF)-29-15, slip op. at 12 (July 28, 2015).

ALJ Sotolongo applied the legal principles explained in *Alan Ritchey* and came to the correct decision that Western violated Section 8(a)(5) when it suspended and terminated employees using discretionary discipline without providing notice to the Union. As noted in the Union’s Exceptions, however, the ALJ erred by solely ordering the Company to bargain about the discipline rather than also restoring the *status quo*. (See Union Brief at 13-21). Briefly, restoration of the *status quo* is the traditional remedy for unilateral changes made without notice to the union. *Daily News of Los Angeles*, 315 NLRB 1236 (1994). This remedy has been awarded in a variety of circumstances, including unlawful closures of facilities, *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999); layoffs, *Eugene Iovine, Inc.*, 328 NLRB 294 (1999) and *Adair Standish Corp.*, 292 NLRB 890 (1989); and unilaterally-implemented drug and alcohol policies, *Delta Tube & Fabricating Corp.*, 323 NLRB 856 (1997) and *Uniserv*, 351 NLRB 1361 (2007). Apart from lengthy discussion of *Anheuser-Busch*, 351 NLRB 644 (2007), in the briefs related to

the Union's Exceptions, the Company has made no attempt to distinguish any of the cases relied upon by the Union for the proposition that *status quo* is the appropriate remedy here.

The Company accurately points out that administrative law judges have been disagreeing about the application of *Fresno Bee*, 337 NLRB 1161 (2002). (Company Brief at 5-6). But for that decision, the concepts applied in *Alan Ritchey* are valid Board law, supported by precedent. (See Union Brief 7-21). Here, the Board can resolve the issue by overruling *Fresno Bee* and re-affirming its rationale in *Alan Ritchey*. Such a decision would also relieve the confusion about *Alan Ritchey*'s application among ALJs, employers, and unions, noted in both the Company and Union Briefs. (See Union Brief at 10 fn. 4). As described in the Union Brief, the Board should also clarify the proper remedy.

The Board's reasons for overruling *Fresno Bee* in *Alan Ritchey* are sound and should be repeated. (See Union Brief at 11). In *Fresno Bee*, "the Board, without comment, affirmed a judge's dismissal of 8(a)(5) charges arising out of the imposition of individual discipline." *Alan Ritchey*, 359 NLRB No. 40, slip op. at 6. In so doing, the Board neglected that the judge had "misunderstood the Board's case law and failed to explain why discipline should be treated as fundamentally different from other employer unilateral changes in terms and conditions of employment." *Id.* Given the well-established case law requiring bargaining over discretionary changes to mandatory subjects after certification, "the judge's conclusion was a non sequitur." *Id.*, slip op. at 7. The judge's rationale was "demonstrably incorrect" and the Board properly overruled the case. *Id.* The same result is appropriate here.

*Fresno Bee*'s holding that unilateral discretionary discipline does not require bargaining after certification is antithetical to the Act. Arguably, discipline has the most direct and visible impact on employees' terms and conditions of employment. Discipline made without bargaining,

therefore, is one of the most obvious and noticeable ways an employer can circumvent its obligation to bargain in the interim between certification and a first contract—a time, incidentally, when employees are first experiencing what it means to have a union. Allowing an employer a free hand in continuing all discretionary discipline demonstrates to employees that exercising their Section 7 right to choose union representation has no effect on their day-to-day working conditions. *Fresno Bee* is an aberration of well-established principles requiring bargaining over discretionary changes during the interim period. Moreover, it is an aberration based on an administrative law judge’s erroneous interpretation of the law. It should be overruled.

**B. Western Ignores that the Unilaterally-Implemented Discipline Constituted *Faits Accompli*.**

Western again references the fact that it offered to bargain about discipline it had already implemented after the Union requested information about suspensions and terminations. Notice is an essential element of the duty to bargain because, without it, a union cannot determine whether it should demand to bargain over an issue. *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1017 (1982), *quoting NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969) (“Each time the bargainable incident occurs—each time new rules are issued—[the] Union has the election of requesting negotiations or not.”). Here, the provision of information to the Union and the Company’s offer to bargain after the suspensions and terminations had been carried out are simply inadequate to remedy the failure to give notice.

Continuing with a theme from its Response to the Union Brief and still without citation to the record, Western insists that Gezahegne Teffera, a member of the Union’s bargaining committee, received notice of the discipline. (Company Brief at 3). This is false, patently so. Teffera testified, without rebuttal, that the Company never notified him of discipline. (Tr. 188).

Instead, he testified that the drivers themselves would inform him of their suspensions and terminations. (*Id.* at 188-189). Even assuming notice provided by employees suffices (which would turn an employer's obligations under Section 8(a)(5) on its head) none of this "notice" occurred before the discipline was imposed and, therefore, cannot transform the Company's *fait accompli* changes into the Union's waiver of its right to bargain over these subjects. *Aggregate Industries*, 359 NLRB No. 156, slip op. at 4 (2013) (no waiver of right to bargain when employer presents a change without a "meaningful opportunity to bargain"), *enfd.* 361 NLRB No. 80 (2014).

Indeed, Western's persistence in overlooking the *fait accompli* doctrine is unrivaled. Its invocation of *American Buslines* fails because, in that case, the employer *provided notice* of the change before acting. 164 NLRB 1055 (1967). Here, no matter how far Western stretches the idea of "notice," the fact that no notice was provided to *anyone* before the suspension and termination is an insurmountable obstacle. The change was unlawful, the ALJ's determination was correct, and Western's exceptions must fail.

**C. The ALJ Correctly Determined that Western's Unilateral Changes to Health Insurance Were Unlawful under the Act.**

The ALJ correctly determined that Western Cab refused to bargain by unilaterally implementing changes to health insurance without notice to the Union. As ALJ Sotolongo noted, the Affordable Care Act ("ACA")

requires employers (and individuals) to comply with certain *minimum* requirements with regard to healthcare coverage, and one of these minimum requirements appears to be that employees be eligible to receive benefits after 60<sup>1</sup> [sic] days of employment. As far as I am aware, there is no provision in ACA that prohibits or precludes employers from granting employees healthcare benefits *before* 60 days of employment, or for that matter offering employee benefits that

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<sup>1</sup> The ALJ referred to a 60-day period in error. The ACA mandates coverage after 90 days of employment. 26 U.S.C. § 4980D.

exceed the minimum standards required by ACA. Thus, Respondent had a certain degree of discretion in deciding how to best comply with ACA. Had the Union been notified of these events, and afforded an opportunity to bargain, it might have been able to propose better terms for its members, and *might* have persuaded Respondent to agree to such better terms. Even if better terms would have never been agreed to by Respondent, the Union might have had suggestions as how to best notify and inform its members about the choices available, and been instrumental in persuading employees to cooperate and participate. This notice and opportunity was never given to the Union, which was shut out of the entire process until it was a fait accompli. Such conduct invariably sends that message to employees that their union is ineffectual, impotent, and unable to effectively represent them. *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002).

(ALJD at 15:3-19; emphasis in original). Again, Western's disregard of the importance of providing notice is a fatal flaw to its argument because, without notice, the Union did not have the opportunity demand bargaining.

The cases relied upon by Western can be distinguished from the case at hand. Western cites Advice Memo *Inland Counties Legal Services, Inc.*, 1996 WL 323643 (1991), for the proposition that an employer may unilaterally increase wages when mandated to do so by federal law. (Company Brief at 9). Western would have been well-served to quote the sentence directly after its citation from the memo because it is relevant to the case at hand: "It is well settled, however, that unilateral changes are unlawful where they are not clearly mandated by federal law, and *where they instead involve some employer discretion.*" *Inland Counties Legal Services*, 1996 WL 323643 at \*3 (emphasis added). Here, the ALJ found that Western had the discretion to implement *better* terms than those imposed by the ACA. (ALJD at 15:9-10 ("Respondent had a certain degree of discretion in deciding how to best comply with ACA")). Bargaining, therefore, was required.

Western's other cases fare no better. In *Murphy Oil USA, Inc.*, the employer unilaterally implemented a rule banning food and drink from areas with exposure to toxic materials. 286 NLRB 1039 (1987). This change was made due to regulations issued by the Occupational Health

and Safety Administration. No discretion was required in that implementation, unlike here with the ACA 90-day rule. Similarly, in *Standard Candy*, 147 NLRB 1070 (1964), the employer lawfully made unilateral changes to wages when it raised the wages of employees making less than the federal minimum wage. The Board found, however, that the employer violated the Act when it granted comparable raises to the rest of the bargaining unit that was making more than the federal minimum wage. Again, there was no exercise of discretion which, as the ALJ pointed out, Western exercised here.

As noted by ALJ Sotolongo, the unilateral change made without notice to the Union or an opportunity to bargain—thereby precluding any bargaining opportunity—tends to undermine the union in the eyes of the bargaining unit. Indeed, the Company’s refusal to bargain

is likely to have a significant, continuing detrimental impact on employees, causing them to become disaffected from the union. This unlawful employer action is not a mere technical infraction. It is a most serious violation that “strikes at the heart of the Union’s legitimate role as representative of the employees.” If a union is unlawfully deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them.

*Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177 (1996) (internal citations omitted).

While it is not the Board’s role to ensure that employees do not become disenchanted with their union, it is the Board’s duty to safeguard that, whatever disenchantment may develop, it is in the absence of the employer’s violation of the law. Here, Western baldly, plainly, and openly made unilateral changes to mandatory subjects of bargaining without providing the Union with the opportunity to demand bargaining. This cannot stand.

### **III. CONCLUSION**

For the reasons stated above, the Union respectfully requests that the Company’s Exceptions be denied and the ALJ’s Decision enforced as requested in the Union Brief.

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Respectfully submitted,

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UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the CHARGING PARTY'S RESPONSE TO WESTERN CAB COMPANY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE was served via electronic mail this 12<sup>th</sup> day of November, 2015, upon

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